



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 22, 1994

Ms. Karen Hendershot Bailey
Assistant City Attorney
Legal Department
City of Victoria
P.O. Box 1758
Victoria, Texas 77902-1758

OR94-565

Dear Ms. Bailey:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 23815.

The City of Victoria (the "city") received two open records requests for certain records relating to a traffic accident and the emergency medical services received by the accident victim.¹ The city contends the requested information may be withheld from the public pursuant to section 552.103 of the Government Code. In response to the first request for the information, the city claimed that the information was related to anticipated litigation regarding "the emergency aid received by the victim at the accident site" based on various discussions held with the accident victim's attorney. In response to the second request for the information, the city stated that "the City is a named party to civil litigation directly involving this patient incident." The city submitted existing responsive information for our review.²

¹You advise us that one of the requestors is a city employee working in the city's EMS department. You also advise us that the requested report involves a patient incident in which the requestor acted as EMS supervisor. We do not address here the extent to which that requestor may have a right of access to the requested information in the scope of her employment.

²The act does not require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed w.o.j.); Attorney General Opinion H-90 (1973); Open Records Decision Nos.

We note that a dispute exists between the city and the requestor as to the existence of additional responsive information. This office cannot resolve factual disputes and must rely on the facts alleged or upon the facts that are discernible from the documents submitted for inspection. Open Records Decision No. 552 (1990) at 4. However, if such records do exist, they are presumed to be public information since they were not submitted to this office for review. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ). This presumption may be overcome by a compelling demonstration that information should not be released. *Hancock*, 797 S.W.2d at 381-82. A compelling demonstration can be made by showing that some other source of law makes the information confidential. Open Records Decision Nos. 552 at 1; 150 (1977) at 2. Thus, if the city has other documents that were not submitted for review by this office, they are presumed to be open and must be released unless some other source of law make such records confidential.

Although the city did not raise section 552.101, this office will raise it on the city's behalf because one of the documents submitted for our review is confidential pursuant to statutory law. Open Records Decision Nos. 481, 480 (1987). Section 552.101 excepts from disclosure information "considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 773.091(b) of the Health and Safety Code makes confidential "[r]ecords of the identity, evaluation, or treatment of a patient by emergency medical services personnel." Therefore, the document entitled "Emergency Medical Service Patient Record" must be withheld from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code.³

(Footnote continued)

452 (1986); 342 (1982); 87 (1975). However, a governmental body must make a good faith effort to relate a request to information held by it, Open Records Decision No. 87, and must advise the requestor of the types of information available so that he may properly narrow his request. Open Records Decision No. 31 (1974). Accordingly, the city must advise the requestor of any records, to the extent that they exist, that contain the requested information.

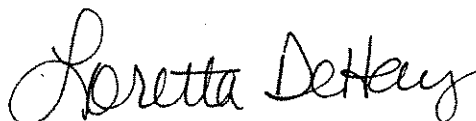
³Section 773.092(a)(4) of the Health and Safety Code provides an exception to the confidentiality of EMS records in any civil litigation or administrative proceeding, if relevant, brought by the patient or someone on the patient's behalf, if the patient is attempting to recover monetary damages for any physical or mental condition, including death of the patient." Although the EMS record at issue here relates to pending litigation in which an EMS patient is attempting to recover damages for injuries allegedly sustained by EMS's neglect, the requests here are not made in the context of "civil litigation or an administrative proceeding." Therefore, section 773.092(a)(4) does not apply.

You contend that section 552.103 excepts the requested information from disclosure because the city is a party to pending litigation. To secure the protection of section 552.103, a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding to which the state or a political subdivision will be a party. Open Records Decision No. 551 (1990). In this instance, you have made the requisite showing that the requested information relates to pending litigation for purposes of section 552.103. The requested records may therefore be withheld.⁴

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestors pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/JCH/rho

Ref.: ID# 23815

Enclosures: Submitted documents

⁴We remind you that section 552.103 is a discretionary exception under the act. See Gov't Code § 552.007. Therefore, the city may choose to release to the public some or all of this information that is not otherwise made confidential by law.

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